FILED BY CLERK
OCT 22 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. WESLEY WAYNE HAMILTON, Appellant.	2 CA-CR 2008-0427 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700750

Honorable Wallace R. Hoggatt, Judge

VACATED AND REMANDED

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V Á S Q U E Z, Judge.

¶1 Wesley Hamilton appeals from his conviction following a jury trial for having failed to register as a sex offender under A.R.S. § 13-3821(A). The trial court sentenced him to an enhanced, presumptive term of ten years' imprisonment. He contends on appeal the court erred by granting the state's motion to amend the indictment to change the date of the alleged offense following the state's presentation of evidence.[1] For the following reasons, we vacate Hamilton's conviction and sentence and remand this matter for further proceedings.

¶2 In November 2007, a grand jury indicted Hamilton for violating § 13-3821(A) by failing to register as a sex offender within ten days of moving from Maricopa County to an address in St. David, Arizona in Cochise County on or about June 18, 2007. Viewed in the light most favorable to sustaining the jury's verdict, *see State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005), the evidence established the following. Hamilton registered as a sex offender in Maricopa County on June 6, 2007, giving as his address that of a men's shelter in Phoenix, Arizona. He stayed at the men's shelter for two days. On July 20, 2007, he appeared before a justice of the peace in Benson, Arizona on an unrelated matter and told the court that his address was in St. David. He listed the St. David address on the conditions of release he signed that day. On August 24, 2007, he was stopped near Mescal, Arizona by a Department of Public Safety officer. Hamilton showed the officer an Arizona identification

[1]He also contends the trial court erred by denying his motion for judgment of acquittal. In light of our resolution of his first issue, however, we need not address this issue.

card that had the St. David address as his. He acknowledged to the officer that he was required to register as a sex offender. He stated he had been told he had sixty days to register in Cochise County and had done so in Bisbee. In fact, however, he did not register as a sex offender in Cochise County until September 4, 2007. On that registration, he listed the St. David address as his residence.

¶3 Following the state's presentation of evidence, Hamilton moved for a judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P. He argued that the state had presented no evidence of the date he had moved to Cochise County, let alone evidence that he had moved there on "any date surrounding" June 18, 2007. The state moved to amend the indictment to conform to the evidence to reflect the offense had been committed on or between July 20 and August 24, 2007. The trial court granted the state's motion over Hamilton's objection, and the jury subsequently returned a guilty verdict.

¶4 We review for an abuse of discretion a trial court's decision to grant a motion to amend an indictment. *State v. Johnson*, 198 Ariz. 245, ¶ 4, 8 P.3d 1159, 1161 (App. 2000). Absent the defendant's consent, a court may amend an indictment "only to correct mistakes of fact or remedy formal or technical defects." Ariz. R. Crim. P. 13.5(b). "An amendment corrects a formal or technical defect, and is therefore permissible, if it does not change 'the nature of the offense charged or prejudice[] the defendant in any way.'" *State v. Fimbres*, ___Ariz.___, ¶ 38, 213 P.3d 1020, 1030 (App. 2009), *quoting State v. Sanders*, 205 Ariz. 208, ¶ 19, 68 P.3d 434, 440 (App. 2003) (alteration in *Fimbres*). An amendment

can change the nature of an offense by either changing the legal description of the elements of the offense or substantively changing the relevant factual allegations. *Sanders*, 205 Ariz. 208, ¶ 25, 68 P.3d at 441.

¶5 As stated above, the amendment in this case changed the date Hamilton allegedly violated § 13-3821(A) from "on or about June 18, 2007," to on or between July 20 and August 24, 2007. Generally, correction of a mere "error as to the date of the offense alleged in [an] indictment does not change the nature of the offense." *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996); *see also State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980) (trial court properly granted motion to amend indictment changing by one day allegation defendant knowingly received prostitute's earnings); *State v. Self*, 135 Ariz. 374, 380, 661 P.2d 224, 230 (App. 1983) (allowing amendment to perjury charge to conform to evidence that date of hearing at which defendant perjured himself September 11, 1979, rather than August 11, 1979, as alleged in indictment). In this case, however, the amendment substantially changed a pivotal fact required to prove Hamilton's guilt.

¶6 Hamilton was charged with a time-sensitive offense. Section 13-3821(A) requires persons convicted of a certain sexually based offenses to register with the county sheriff "within ten days after entering and remaining in any county of this state." Thus, under the original indictment, the jury could have found Hamilton guilty only if it found beyond a reasonable doubt that he had entered and remained in Cochise County by approximately

June 8, 2007. The amended indictment, however, permitted the jury to return a guilty verdict if it found Hamilton had entered and remained in Cochise County as late as August 14, 2007. Thus, this case is distinguishable from the cases on which the state relies, none of which involves an offense that includes a time-specific element.

¶7 Given the nature of the state's burden of proof in the context of that time element, the amendment here, occurring after all the evidence had been presented, meaningfully changed the factual allegations, such that it deprived Hamilton of his Sixth Amendment right to notice sufficient to provide him with "'an ample opportunity to prepare to defend'" against the charge. *Sanders*, 205 Ariz. 208, ¶ 37, 68 P.3d at 443, *quoting State v. Barber*, 133 Ariz. 572, 577, 653 P.2d 29, 34 (App. 1982). Under the original indictment, defense counsel reasonably could have asserted that the state had failed to present any concrete evidence that Hamilton had arrived in Cochise County by June 8. Indeed, until the state moved to amend the indictment, the record suggests that the trial court was contemplating granting Hamilton a judgment of acquittal on that very basis.[2] As amended, however, Hamilton's statements suggesting he resided in St. David in late July and August became more than circumstantial evidence of a possible relocation in early June. They now arguably constituted dispositive admissions that he had committed the amended offense. Because Hamilton received no notice that he would be called upon to counter the amended

[2]After Hamilton argued his Rule 20 motion to the court and before the state moved to amend its indictment, the court noted, "Well, the state may come to regret the selection of June 18th[] of 2007.

charge, we can only speculate how his defense would have changed under those circumstances. *See id.* ¶ 24 (when nature of offense changes, "trial court record is irrevocably tainted because we can never know from that record whether the evidence of the amended charge could have withstood a well-prepared cross-examination, a different justification defense, or any other of the many testing devices inherent in our adversarial process").

¶8 Thus, we conclude the trial court abused its discretion by granting the state's motion to amend the indictment. "[A]n amendment that changes the nature of the charged offense is prejudicial per se." *Sanders*, 205 Ariz. 208, ¶ 50, 68 P.3d at 446. *But see State v. Freeney*, 220 Ariz. 435, ¶ 27, 207 P.3d 688, 694 (App. 2008) (declining to apply *Sanders*'s per se prejudice rule to *pretrial* amendment to indictment). Accordingly, we vacate Hamilton's conviction and sentence and remand this matter for further proceedings consistent with this decision.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge